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No. 81-6756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR PETITIONER

LINDA GILLESPIE STUNTZ
House Annex 2, Room 564
2nd & D Streets, S.W.
Washington, D.C. 20515
(202) 226-3400
Counsel for Petitioner

Of Counsel
ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

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QUESTION PRESENTED

Whether an offense for which a youth serves a term of probation pursuant to section 5010(a) of the Federal Youth Corrections Act may be used years later, long after the youth is unconditionally discharged from the Youth Corrections Act program, as the basis for imposing a recidivist felony penalty.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 440 A.2d 1008, and appears at J.A. 19-26.[1] The *per curiam* Order of that court, denying Tuten's petition for rehearing *en banc*, is not reported. That Order is set out at J.A. 27.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on February 10, 1982. A petition for rehearing *en banc* was denied on March 30, 1982. A petition for certiorari was filed on May 20, 1982 and certiorari was granted on October 12, 1982.

The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

STATUTES INVOLVED

A. The Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq.* (1976). Pertinent provisions are:

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of

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[1] References to petitioner's Appendix filed herewith shall be made as App. ____. References to the Joint Appendix shall be made as J.A. ____.

imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

* * *

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offerder has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

B. 22 D.C. Code § 3204. Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

* * *

§ 22 D.C. Code § 3215.

Any violation of any provision of this Chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000, or imprisonment for not more than a year, or both.

C. 23 D.C. Code § 111. Proceedings to establish previous convictions.

(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding

previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

* * *

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose upon him as provided by law.

* * *

STATEMENT

1. The Federal Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.*, was enacted in 1950 in order "to rehabilitate persons who, because of their youth, are especially vulnerable to the danger of recidivism . . ." *Ralston* v. *Robinson*, 454 U.S. 201, 206, citing *Dorszynski* v. *United States*, 418 U.S. 424, 433. "The core concept of the YCA, like that of England's Borstal System upon which it is modeled, is that rehabilitative treatment should be substituted for retribution as a sentencing goal," *Durst* v. *United States*, 434 U.S. 542, 544; S. Rep. No. 1180, 81st Cong., 1st Sess. 4 (1949); H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4-7 (1950).

To achieve this objective, the Act provided sentencing judges with a broad range of new sentencing options designed to provide treatment rather than punishment.

Indeed, the Federal Youth Corrections Act is "the most comprehensive federal statute concerned with sentencing." *Dorszynski* v. *United States*, 418 U.S. 424, 432; *United States* v. *Hopkins*, 531 F.2d 576, 581 (D.C. Cir. 1976) (acknowledging "distinctive character" of youth offender sentencing).

Under the Act, a person below the age of twenty-two (a youthful offender) or between the ages of twenty-two and twenty-six (young adult offender) may be committed to the custody of the Attorney General for "treatment and supervision"[2] for a period of up to six years (18 U.S.C. § 5010 (b)). Commitment under the Act may be for longer than six years, up to the maximum adult offender sentence for the offense charged, if the court "find[s] that [he] may not be able to derive maximum benefit from treatment" within six years (18 U.S.C. § 5010(c)). If it is determined that the offender would not benefit from treatment, he may be sentenced as an adult offender, 18 U.S.C. § 5010(d). Finally, if, in the opinion of the court, a youth offender does not need commitment, the court may suspend the imposition or execution of sentence and place the youthful offender on probation (18 U.S.C. § 5010(a)). The FYCA has been interpreted to give the judge discretion to place the offender on either regular adult probation (18 U.S.C. § 3651 *et seq.)* or Youth Corrections Act probation. *United States* v. *Kurzyna*, 485 F.2d 517 (2d Cir. 1973), *cert. denied*, 415 U.S. 949.[3]

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[2] "Treatment" is defined in section 5006(f) of the Act as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders."

[3] Youth Corrections Act probation is presumably subject to the five-year maximum provided by 18 U.S.C. § 3651. However, if sentence is imposed by a United States Magistrate, Youth Corrections Act probation is apparently limited to six months for conviction of a

The release of youth offenders *committed* under section 5010 is governed by 18 U.S.C. § 5017. The Director of the Bureau of Prisons and the Parole Commission "may at any time . . . release conditionally under supervision a committed youth offender . . ." 18 U.S.C. § 5017(a). An offender must be conditionally released from custody no later than two years before the expiration of his sentence. Unconditional discharge must occur no later than the expiration of the maximum sentence imposed. No such discharge guidelines are specified for youthful offenders placed on probation.

If a committed youthful offender is discharged unconditionally before such a discharge would have been required under the statute, the conviction upon which the sentence rested is automatically set aside and a certificate is issued to that effect. 18 U.S.C. § 5021(a). Initially, this "powerful tool" *(Dorszynski* v. *United States*, 418 U.S. at 435) applied explicitly only to committed youth offenders.

In 1961, however, section 5021(b) was added[4] "to extend the benefit of a certificate to youths sentenced to probation under section 5010(a) when the court unconditionally discharges the youth prior to expiration of the sentence of probation imposed." *Durst* v. *United States*, 434 U.S. 542, 548. Senator Thomas Dodd, the sponsor of the 1961 amendment, noted that, without the amendment, a youth offender who received an early re-

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petty offense and one year for conviction of a misdemeanor. See 18 U.S.C. § 3401 (g)(3), as amended by the Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 7; 93 Stat. 643.

[4] Act of October 3, 1961, Publ. L. No. 87-336; 75 Stat. 750 (codified at 18 U.S.C. § 5021(b) (1976 ed.)).

lease from probation had his conviction "remain on the record *until the original sentence expires.*" 87 Cong. Rec. 8209 (1961) (emphasis added).

2. On February 12, 1971, Melvin E. Tuten, petitioner, entered a plea of guilty in the District of Columbia Court of General Sessions to the charge of carrying a pistol without a license in violation of 22 D.C. Code § 3204.[5] The imposition of sentence was suspended and Tuten was placed on probation for two years under section 5010(a) of the Federal Youth Corrections Act. At the end of that two year probationary period, Tuten was discharged unconditionally from the FYCA program.

Tuten did not apply for a certificate setting aside his FYCA conviction, as is provided by section 5021(b) of the Federal Youth Corrections Act, and no such certificate was issued by the sentencing judge. Although procedures adopted by the District of Columbia Department of Probation with respect to youthful offenders sentenced under section 5010(a) of the Federal Youth Corrections Act required that a memorandum concerning the youth's progress be submitted to the sentencing judge at least thirty days prior to the expiration of the youth's term of probation, no such memorandum was submitted regarding Mr. Tuten. (Affidavit of James E. Porter (App. 2)).[6]

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[5] Appended hereto is a certified copy of the disposition of Criminal Case number 47324-70, rendered on February 12, 1971. (App. 1.) In the Petition for Certiorari, the date November 16, 1970 was stated to be the date when sentence was imposed. This was in error. It was the date on which petitioner was arrested for the earlier offense.

[6] Despite earlier efforts to ascertain the circumstances surrounding the termination of petitioner's probation in 1973, the information related by Mr. Porter only recently became known to petitioner. That is why it is presented to the Court now, in this form. Counsel for

Consequently, petitioner's term of probation was allowed to expire without judicial attention to the question of whether or not he deserved early discharge from probation and the set aside of his offense as provided by the Federal Youth Corrections Act.

On November 24, 1979, more than six years after petitioner's unconditional discharge from probation, he was arrested and charged with carrying a pistol without a license. At a preliminary hearing held on December 3, 1979, however, the court found no probable cause and Tuten was discharged.

Seven months later, on June 19, 1980, a two-count indictment was filed charging Tuten with assault with a dangerous weapon (a stick) and carrying a pistol without a license after having previously been convicted of carrying an unlicensed weapon. Both offenses were allegedly committed on November 23, 1979.

Prior to trial, the Government informed the court below, pursuant to 23 D.C. Code section 111, that Tuten had previously been convicted of carrying a pistol without a license and was therefore subject to the increased, recidivist penalty provided by 22 D.C. Code § 3204 (J.A. 5). The previous conviction relied upon by the Government was the 1970 offense for which Tuten had been sentenced under the Federal Youth Corrections Act (J.A. 5, App. 1).

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the Government was notified and provided with a copy of Mr. Porter's affidavit one day after it was executed.

The failure of the Government officers to submit the matter to the court, and the consequent failure of the court to exercise its discretion, as provided by law, is itself sufficient reason for reversing the decision below.

Petitioner's trial began on November 26, 1980. The following day, the jury found him not guilty of assault with a dangerous weapon, but guilty of carrying a pistol without a license.

Sentencing was originally scheduled for January 5, 1981. Following a brief meeting on that date, however, sentencing was postponed to allow for the completion of another separate and subsequent criminal proceeding in which Tuten was the defendant before the same judge. At the abbreviated January 5 hearing, trial counsel raised the issue of whether Tuten could properly be charged as a recidivist based on his prior FYCA conviction (J.A. 6-7).

On January 26, 1981, notwithstanding a favorable presentence report, over objection by trial counsel that use of the recidivist penalty was wrong (J.A. 10-12) and after the Government misrepresented Tuten's prior criminal record,[7] Tuten was given a felony sentence of not less than two nor more than six years (J.A. 15). Had he been sentenced as a first-time offender, pursuant to 22 D.C. Code section 3215, the maximum sentence would have been one year imprisonment.

As he imposed the felony sentence, the Hon. Joseph F. Ryan, Jr. remarked that the question of whether a repeat-offender sentence could be imposed on the basis of the prior FYCA offense would be "an interesting question for the Court of Appeals." J.A. 12.

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[7] The prosecuting attorney, without any basis in fact, suggested that Tuten had a long history of criminal activity, stating that Tuten's "record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests." J.A. 11-12.

Petitioner appealed (J.A. 17-18). The District of Columbia Court of Appals acknowledged the unique operation and rehabilitative purpose of the Federal Youth Corrections Act (J.A. 24), but the Court affirmed Tuten's conviction, stating (J.A. 25):

> Since the enhanced penalty depends upon the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not.

The court declined to address the fundamental question of whether sentencing a defendant as a felon based on a prior FYCA conviction is proper (J.A. 26). Under the court's reasoning, the judiciary has no role in remedying any injustice suffered by petitioner, even though the remedy here lies in harmonizing the operation of the Federal Youth Corrections Act and the District of Columbia's repeat weapons offender act, so as to serve the purposes of both.

Following denial of rehearing *en banc* (J.A. 27), a petition for a writ of certiorari to review the decision of the District of Columbia Court of Appeals was filed in this Court. The petition and the motion for leave to file *in forma pauperis* were granted by this Court on October 12, 1982 (J.A. 28).

SUMMARY OF ARGUMENT

Petitioner was given one of the lightest penalties possible under the Federal Youth Corrections Act in 1971, and was unconditionally discharged from the FYCA program two years later, without the benefit of judicial review of his performance while on probation. He encountered no further difficulty with the law for nearly seven years.

Nevertheless, the court of appeals held that he should be treated just like any other prior offender for purposes of applying the recidivist felony penalty contained in section 22-3204 of the D.C. Code.

This conclusion is wrong because it (a) is wholly at odds with the purposes and judicial construction of the FYCA, and in particular with the liberal construction afforded section 5021 by the judiciary; (b) does not serve the purposes of repeat offender statutes like section 22-3204 of the D.C. Code; and (c) is not compelled by the statutory language of either the FYCA or the D.C. Code.

(A) As described previously, the principal purpose of the Federal Youth Corrections Act is to rehabilitate, not punish. *Dorszynski* v. *United States*, 418 U.S. 424, 433. "The Act is meant to be an alternative to punishment. Sentencing under the Act is distinguishable from an ordinary prison sentence." *United States* v. *Hunt*, 661 F.2d 72, 75 (6th Cir. 1981). Thus, the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119, 1123 (1980), *cert. denied, on other issues*, 449 U.S. 1086, determined that "Because of the Youth Corrections Act's unique import, the government's citations are inapposite and its position [that an FYCA conviction could be used as the basis upon which to impose a recidivist penalty] erroneous."

Relying upon the text of section 5021(b), the court below held that because petitioner was not unconditionally discharged prior to the expiration of his two-year probationary term, his conviction was not automatically set aside, and could be used to trigger an enhanced, recidivist penalty. In limiting section 5021(b) so sharply, the court of appeals ignored the unique rehabilitative aims of the FYCA, elevated form, and ignored substance. The court's niggardly construction of section 5021 con-

flicts with the liberal interpretation accorded section 5021 by the vast majority of courts that have considered it.

If the decision is allowed to stand, it will virtually ensure that committed youth offenders receive the benefits of the set-aside provision more often than youths placed on probation, especially those placed on probation for a short period of time. This is because there are no release guidelines for youth offenders placed on probation, as are applicable to committed youth offenders. And, because of the shorter period of supervision involved for youthful offenders places on probation, it will, as a practical matter, be more difficult for youths to convince a sentencing judge to exercise his discretion under section 5021 in their favor.[8] This surely was not what Congress intended to do when it sought to "correct an existing inconsistency"[9] in the Federal Youth Corrections Act by adding section 5021(b) in 1961.

(B) The court below merely assumed that an FYCA conviction not set aside pursuant to section 5021 could be used later as the basis for the recidivist sentence petitioner received in 1981 (J.A. 26). This Court has said, how-

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[8] Indeed, petitioner's case was not brought to the attention of the sentencing judge before the end of his probationary term. (App. 2.) We will never know whether petitioner would have qualified for early release: the opportunity for the sentencing judge to exercise the discretion entrusted to him by section 5021 has long since passed. The point is, if the decision of the court below is allowed to stand, early release from probation and automatic set-aside of the conviction of a youth offender sentenced to a short term of probation will realistically depend more on good luck (and perhaps a good lawyer) than on good behavior.

[9] S. Rep. No. 1048, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code, Cong. & Ad. News 3050.

ever, that "the purpose of a recidivist statute . . . is not to simplify the task of prosecutors, judges or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel* v. *Estelle*, 445 U.S. 263, 284. Comparing these goals against the facts of this case demonstrates that sentencing petitioner as a recidivist does not serve the legitimate purposes of a recidivist statute any more than it serves the purposes of the FYCA.

(C) Nothing in the language of the Federal Youth Corrections Act is specifically directed to the question presented by this case: may an offense for which a youthful offender serves a brief term of probation pursuant to section 5010(a) of the Act be used years later as the necessary predicate for a recidivist penalty. When the Federal Youth Corrections Act was passed in 1950, "expungement statutes were uncommon and not generally understood or accepted."[10] Congress did not anticipate that the FYCA and recidivist statutes might be construed together in a manner contrary to the purposes of both.

Section 22-3204 of the D.C. Code which penalizes the carrying of concealed weapons was originally enacted in 1932. The drafters of that provision could not have been thinking about the role that FYCA convictions would

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[10] Comment, "Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision," 66 Ky. L. J. 741, 742 (1978) (hereafter "Expungement of Criminal Convictions").

play in the repeat-offender scheme developed in section 22-3204.

When faced with an issue that was not contemplated by the drafters of the statute in question, the function of the judiciary is not merely to shrug and decline any role in resolving the issue, as did the court below. Instead, a court must "carry into execution the will of the legislature" by interpreting the statute in a way consistent with "the objects and policy of the law." *Kokoszka* v. *Belford*, 417 U.S. 642, 650, quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194. A court has the same responsibility when the question presented involves the interrelationship of two or more statutes. "As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608.

The purposes Congress sought to serve in enacting the FYCA and D.C. Section 22-3204 are completely frustrated by the use of a prior FYCA conviction—one for which a youth has served a term of probation and been discharged unconditionally from the FYCA program—to trigger a recidivist penalty.

ARGUMENT

I. THE PRINCIPAL PURPOSE OF THE FEDERAL YOUTH CORRECTIONS ACT IS TO REHABILITATE, NOT TO PUNISH AS IT WAS USED HERE

A. The Legislative History Of Section 5021 Indicates That It Was To Be A Broad Tool, Instrumental In Accomplishing The Rehabilitation Aims Of The Act

1. Section 5021(a)

In 1942, Chief Justice Harlan Stone appointed a special committee of federal judges to conduct a survey of the

crime correction program in the federal courts. That committee's report contained a draft of what was later to become the Federal Youth Corrections Act. Report to the Judicial Conference of the Committee on Punishment for Crime, "Proposed Draft of an Act to Provide a Correctional System for Adult and Youth Offenders" (1942) (hereafter "Committee Report").

That draft provided:

> Upon the unconditional discharge by the Authority of a youth offender before the expiration of six years from the date of his conviction, where an original sentence was not imposed on such youth offender, and upon the unconditional discharge by the Authority of a youth offender upon whom an original sentence was imposed, before the expiration of the original sentence, the conviction shall be automatically set aside and held for naught . . .

1942 Committee Report at 19-20.

In 1946, the Judicial Conference adopted a revised version of this draft which became the basis for S. 1114. The pertinent provision of S. 1114, section 5025, reads as follows:

> Upon the unconditional discharge by the Board of a youth offender before the expiration of six years from the date of his conviction, the conviction shall be automatically set aside and the Board shall issue to the youth offender a certificate to that effect (a certificate which shall have the same legal effect as a pardon)."

"Correctional System for Youth Offenders," Hearings on S. 1114 and S. 2609 Before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess. 4 (1949).

During the 1949 hearings before the Senate Judidiary Committee, the language was stricken, and the present 5021(a) was substituted in S. 2609 by means of a "technical amendment." *Id.* at 71. This and other technical amendments were adopted without debate (96 *Cong. Rec.* 8267, 68 (1950) (Daily ed.)), but there is evidence that the "pardon" language was eliminated on the ground that this had traditionally been (and under the Constitution was) an executive function.[11] Reviewing the legislative history in *Doe* v. *Webster*, 606 F.2d 1226, 1235 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit concluded that another "plausible explanation for the change in wording is that Congress deemed that the 'pardon' clause would not effectively provide the youth offender with the clean slate intended by the drafters."

Two things at least are clear from this review of the genesis of section 5021. First, all the 1949-1950 discussion regarding the scope and operation of section 5021, including the legislative history cited by the court below (J.A. 21-23), is predicated on a "maximum" sentence of either six years or a longer adult sentence. Those were the only sentencing options available for committed offenders. In this context, the meaning of section 5021(a) is that anyone unconditionally discharged prior to expiration of "the full maximum term,"[12] i.e., six years or longer, was entitled to the set aside of the underlying conviction.

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[11] Schaefer, "The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction," Fed. Probation, Sept. 1975 at 32.

[12] H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950).

Congress did not focus at that time on what conviction set-aside benefits, if any, would be available if the maximum sentence imposed were less than six years, or *if no sentence at all were imposed*, as in the case here, where the imposition of sentence was suspended and the offender was placed on probation. *See United States* v. *Glasgow*, 389 F. Supp. 217, 220 n. 6 (D.D.C. 1975).

Thus, the legislative history of section 5021(a) is not determinative on the specific question posed by this case. To the extent that this history indicates that Congress intended to reward youth offenders who made satisfactory adjustment and were unconditionally discharged from the FYCA program in less than six years, or the maximum sentence allowed for the offense, it supports petitioner's contention that his conviction was set aside by his unconditional discharge from the FYCA program after two years.[13]

Second, the objective of section 5021(a) was to free young persons from the "antirehabilitative effects of attempting to live and work with a criminal record."[14] Although this Court has yet to rule directly on what remains of an FYCA conviction that has been set aside pursuant to

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[13] "The statute called for automatically setting aside a conviction upon the unconditional discharge of the youth from the youth corrections division prior to the expiration of the maximum sentence allowed for the offense and for the issuance of a certificate to that effect." Comment, Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision, 66 Ky. L. J. 741, 742 (1978).

[14] Note, "Expungement of Criminal Records Under the Youth Corrections Act," 62 Iowa L. Rev. 547, 563 (1976) (hereafter "Expungement of Criminal Records").

Section 5021,[15] the prevailing view, based upon the legislative history and purposes of the Act, is that a set-aside conviction is without further legal effect. *See, e.g., Doe* v. *Webster*, 606 F.2d at 1238 ("if these purposes of the Act are to be effectuated, the set-aside provision must be accorded a liberal construction which allows the rehabilitated youthful offender a meaningful fresh start by protecting him from those "stigma" consequences of his conviction which impede his reintegration into society"); *Mestre Morera* v. *United States Immigration and Naturalization Service*, 462 F.2d 1030, 1032 (1st Cir. 1973) ("The clear purpose for the automatic setting aside of a youthful offender's conviction if he responds satisfactorily to treatment under the [FYCA] is to relieve him not only of the usual disabilities of a criminal conviction, but also to give him . . . a second chance free of a record tainted by such a conviction"); *United States* v. *Fryer*, 595 F.2d 11 (6th Cir. 1976) (felony conviction set aside by the FYCA cannot constitute the prior felony conviction needed as an essential element in firearms crimes under 18 U.S.C. App. § 1202(a) and 18 U.S.C. § 922(a)(6)). *See also United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977) and *United States* v. *Doe*, 496 F. Supp. 650 (D.R.I. 1980).

The teaching of these cases is that section 5021, and the principle of forgiveness which it embodies, plays a critical role in the successful operation of the FYCA. When a youthful offender has responded to the treatment provided by the FYCA and has earned his unconditional

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[15] In *Dorszynski* v. *United States*, 418 U.S. 424, 429, n.6, the Court noted that 18 U.S.C. § 5021 does provide for relief from "the disabilities accompanying a criminal misdemeanor conviction . . ."

discharge, denying the youth a fresh start eviscerates the Act.

2. Section 5021(b)

What is the situation of those minor offenders who were given terms of probation rather than sentenced to commitment under the FYCA? Eleven years after the Act was passed, section 5021(b) was enacted. Pub. L. No. 87-336, 75 Stat. 750 (1961).

As construed by the court below, section 5021(b) provides for the set aside of FYCA convictions "only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is coconditional (sic)." J.A. 21.

This interpretation is not, however, borne out by the legislative history of section 5021(b). According to S. Rep. No. 1048, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 3050:

> The purpose of this bill is to correct an existing inconsistency in the Federal Youth Correction Act. Presently a youth offender who has been committed or incarcerated *is entitled upon discharge* to have his conviction set aside. . . . The instant bill will now make available to a youth offender who is placed on probation the same benefits that a youth offender receives who has been committed to a correctional institution. [Emphasis supplied.]

No mention of discharge prior to the expiration of the term of probation imposed upon the offender is mentioned.

The sponsor of section 5021(b), Senator Thomas Dodd, stated that without 18 U.S.C. § 5021(b), a youth offender

who received an early release from probation has his conviction "remain on the record *until the original sentence expires.*" 87 *Cong. Rec.* 8709 (1961) (emphasis added). Implicitly, it was Senator Dodd's understanding that even without 18 U.S.C. § 5021(b), an offender sentenced to a term of probation would have his conviction set aside when "the original sentence expires." As the sponsor and floor manager of the bill, Senator Dodd's statements are entitled to weight.[16] *Simpson* v. *United States*, 435 U.S. 6, 13.

Petitioner does not contend that the language of section 5021(b), in isolation, requires the conclusion that his conviction was set aside upon his unconditional discharge from probation. However, as the court in *Arrington* determined, that position is the only one which comports with the legislative purposes underlying the Federal Youth Corrections Act, as reflected in its legislative history. Especially here when the sentencing judge never exercised the discretion entrusted to him by section 5021(b), an excessively mechanical reading of section 5021(b), uninformed by the purpose it was to serve, works a great injustice that this Court should remedy.

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[16] Compare, however, the statement of then Deputy Attorney General, Byron R. White, in a letter to Hon. Emanuel Cuellar, Chairman of the Committee on the Judiciary:

> The bill would add a new subsection to section 5021 to provide that upon the unconditional discharge of a youth offender prior to the maximum expiration period of his probation fixed by the court, his conviction shall be automatically set aside and the court shall issue a certificate to that effect.

Contained in S. Rep. 1048, *reprinted in* [1961] U.S. Code Cong. & Ad. News 3051.

B. Lower Courts Have Agreed That Section 5021 Bars The Use Of Petitioner's FYCA Conviction As The Basis For The Imposition Of A Recidivist Penalty

As this Court has said, "it is fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" *Richards* v. *United States*, 369 U.S. 1, 11 (footnotes omitted).

Following this principle, the United States Court of Appeals for the Fifth Circuit has held that an offender's unconditional discharge after satisfactorily completing an FYCA sentence under section 5010(b) entitles the offender to the benefits of section 5021(a). *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied on other issues*, 449 U.S. 1086.

John Arrington had been convicted of violating 18 U.S.C. § 1202(a)(1)(1976), a federal law similar to D.C. Code § 22-3204, which forbids the possession of firearms by a convicted felon. The prior felony upon which the violation of section 1202 was based was one for which Arrington had been sentenced under section 5010(b) of the FYCA. Arrington received his unconditional discharge from the program after the six year term provided by section 5010(b).

Arrington appealed his conviction on the section 1202 recidivist charge. Relying upon section 5021(a), he argued that since he had received an unconditional discharge following the completion of his FYCA sentence imposed for the prior felony, "he no longer bore the onus of that conviction and consequently could not have been charged [as a previously convicted felon.]" 618 F.2d at

1121. The Fifth Circuit agreed with Arrington, saying: "Not only does the clear statutory language command this result, but so also does the policy underlying the Youth Corrections Act."

Although the Government argued that *Lewis* v. *United States*, 445 U.S. 55, sanctioned the use of the prior FYCA conviction as the basis for a recidivist penalty, the court distinguished *Lewis* on the grounds that prior FYCA convictions are fundamentally different from other prior convictions:

> The Youth Corrections Act, however, actually operates to remove certain youthful offenders from the realm of those persons who have been convicted of a felony. The Act's import is to remove the taint of youthful indiscretions, giving a youthful offender a second chance to live free of the lifelong ignominy of a criminal record. [Citations omitted.] If a youthful offender has been unconditionally discharged, the disabilities of a criminal conviction are completely and automatically removed; indeed, the conviction is set aside as if it had never been.

618 F.2d at 1124 (citations and footnote omitted).

At least so far as the application of a recidivist penalty was concerned, the court held that Arrington's satisfactory completion of the FYCA sentence imposed upon him had erased that prior felony conviction.[17]

United States v. *Villar*, 416 F. Supp. 886 (S.D.N.Y. 1976) and *United States* v. *Sinkfield*, 484 F. Supp. 595

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[17] The Court noted: "We do not need to decide now if 18 U.S.C. § 5021(a) [1976] also serves to expunge even the record of Arrington's previous conviction. For the purposes of this appeal, defining expunction to include at least setting aside his conviction is a satisfactory resolution." 618 F.2d 1124, n. 8 (citations omitted).

(N.D. Ga. 1980), are further authority for the proposition that youth offenders who complete probationary terms imposed under the FYCA are entitled to be free of the taint of a prior conviction. In *Sinkfield*, the court stated that "upon successful completion of his probationary period, defendant Sinkfield will be entitled to a certificate pursuant to 18 U.S.C. § 5021 setting aside his conviction," 484 F. Supp. 598.[18] In *Villar*, the court found that the defendant's conviction "would be automatically set aside upon his discharge from probation." 416 F. Supp. 889.

C. No Court Other Than The Court Below Has Allowed A Youth Sentenced To A Term Of Probation Under The Federal Youth Corrections Act To Be Later Punished As Recidivist Solely On the Basis Of That Prior Youth Conviction

The court below determined that the *Arrington* decision was based on "unpersuasive authority" and was contrary to the legislative history of the Act (J.A. 21-23). Similarly, the Government in its Memorandum in Opposition to the Petition for Certiorari suggests that the *Arrington* decision is "clearly aberrational," and should be disregarded (p. 3). Yet, no pertinent authority to the

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[18] The Government, in its Memorandum in Opposition to the Petition for Certiorari, suggests that because in *Sinkfield* the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35, it "may well have thought that action, itself, satisfied the early release requirement of Section 5021 (p. 6, n. 5). This suggestion, however, is contrary to the Government's contention that 5021(b) must be strictly construed. How one received a probationary sentence under the FYCA is not a concern of section 5021(b). Following the Government's argument, the only pertinent fact is whether the offender was discharged early from the probationary term that he was given.

contrary is offered by either the court below or the Government, other than discussions of the statute and legislative history.[19]

The court below recognized that the policies of rehabilitation embodied by the FYCA strongly favor sentencing youths under the FYCA whenever possible. But the court reasons from this premise not that petitioner's position should be adopted so as to encourage youths to seek out FYCA treatment, secure in the knowledge that if they respond appropriately, they will not be punished again for this misdeed. Instead, the court expresses concern that the adoption of petitioner's position would be likely to result in reducing the use of the FYCA. This is because trial courts might not sentence under the FYCA if they knew that this youthful conviction would not "count" for purposes of a later felony conviction. (J.A. 25.)

This argument is flawed in two respects. First, since it appears that only the District of Columbia is currently "counting" FYCA convictions like petitioner's for purposes of a later recidivist penalty, one would not expect much change nationally in the use of the FYCA were all sentencing judges prevented from using FYCA convictions in this manner. Second, and more importantly, the court's analysis assumes that judges believe that prosecu-

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[19] *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978), like *Lewis* v. *United States*, 445 U.S. 55, involved collateral challenges to the validity of prior felony convictions. In *United States* v. *Brzoticky*, 588 F.2d 773 (10th Cir. 1978), the court held that a prior felony conviction, the record of which was sealed and expunged *after* the defendant had been charged with a recidivist offense, could properly be used. None of these cases involved prior convictions under the Federal Youth Corrections Act.

tors will be seriously hampered in the effective and proper use of recidivist penalties unless FYCA convictions like petitioner's can be used later to trigger recidivist penalties. No such contention has been made by the Government. Given the purpose of the FYCA—to reach out to youthful offenders while they can still be reached—and the basic purpose of recidivist penalties—to punish severely those who by repeated violations of law show themselves to be a threat to society—no such contention is plausible.[20]

This Court, by adopting petitioner's position and barring the later use of FYCA convictions which are followed by the youth's unconditional and timely discharge from the program, would do much to increase the attractiveness of the FYCA for *both* defendants and judges.

II. EVEN IF PETITIONER'S 1971 FEDERAL YOUTH CORRECTIONS ACT CONVICTION WAS NOT SET ASIDE PURSUANT TO SECTION 5021, THAT CONVICTION SHOULD NOT BE USED AS THE BASIS UPON WHICH TO IMPOSE A RECIDIVIST PENALTY

A. The Purpose Of Recidivist Penalties Would Not Be Served

A number of different rationales exist for enhanced penalties for repeat offenders. Deterrence, retribution,

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[20] Unfortunately, because of controversy generated by the FYCA and the failure of the Bureau of Prisons to implement the Act as Congress desired (*United States* v. *Hunt*, 661 F.2d 72, 75 (6th Cir. 1981)), some defendants are strongly opposed to being sentenced under the Act. *See United States* v. *Amidon*, 627 F.2d 1023 (9th Cir. 1980). *See also* "Oversight Hearings on Federal Bureau Policies Regarding Placement of Juveniles and Implementation of the Youth Corrections Act," Before the House Judiciary Committee, 96th Cong., 2d Sess. (1978).

incapacitation, and even rehabilitation are motivating factors for the recidivist penalties that appear in virtually all penal codes.[21] Although any of these purposes may suffice to support a recidivist penalty, there should be at least some reason to believe that one or more of those purposes will be achieved by the imposition of a recidivist penalty in any particular case. Certain objective criteria have been developed by which the propriety of recidivist treatment for a particular offender can be judged.

The ABA Standards on Sentencing Alternatives and Procedures, for example, specify that:

> An enhanced term should only be permitted if the sentencing court finds that such a term is necessary in order to protect the public from a substantial possibility of further serious criminal conduct by the defendant, and, in support of this finding, also finds that:
>
> (i) the offender has previously been convicted of two felonies committed on different occasions, and the present offense is a third felony committed on an occasion different from the first two . . .; and
>
> (ii) less than five years have elapsed between the commission of the present offense and [the last felony or release from the last felony offense] and
>
> (iii) the offender has previously served a term of total confinement in excess of one year.

ABA Standards, 18-4.4 (2d ed. 1980) p. 18-276-277.

The ABA Standards are, of course, not law. They do, however, illuminate the injustice in imposing a recidivist penalty (punishment is multiplied by a factor of ten under

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[21] *See* ABA Standards on Sentencing Alternatives and Procedures, Commentary (2d ed. 1980) p. 18-278.

D.C. section 22-3204) upon petitioner, whose only prior offense was a misdemeanor in 1970 for which he was given a term of two years probation under a special rehabilitation program. The interest of the District of Columbia in the enforcement of recidivist penalties, as "expressed in all recidivist statutes, [is] in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel* v. *Estelle*, 445 U.S. 263, 276. Melvin Tuten's record does not show him to be the type of person at whom recidivist penalties are aimed.

Petitioner acknowledges that this Court will not interfere with the exercise of sentencing discretion,[22] and no such inquiry is sought. Rather, his intent here is to demonstrate that adopting petitioner's position barring the use of FYCA convictions such as his to trigger recidivist penalties would not be contrary to the legitimate purposes of recidivist statutes nor would it harm the administration of justice in any other way.

B. The Court Should Not Approve The Decision Of The Court Below When There Is No Evidence That Congress Intended This Harsh Result

The court below declined to address the question whether it was proper for a conviction punished under the FYCA, set aside or not, to be used as the basis for the imposition of a recidivist penalty.

> If sentencing defendant as a felon based on an FYCA conviction is unjust, the remedy must be afforded by Congress, not this court in the guise of

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[22] *See, e.g., Dorszynski* v. *United States*, 418 U.S. at 443.

> statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorsznski* v. *United States*, *supra*, 418 U.S. at 442, 94 S. Ct. at 3052.

J.A. 26.

This analysis ignores the fact that Congress has never addressed the question of what happens when an FYCA conviction is sought to be used to trigger a recidivist penalty. This kind of situation is not uncommon. Indeed, it is a classic instance of the sort of issues which fall to the judiciary. "Inherent limitations on language and congressional vision mean that, without the aid of the courts, the effectiveness and rationality of congressional demands are inevitably eviscerated." Note, "Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court," 95 Harv. L. Rev. 892, 904 (1982) (hereinafter "Intent").

This Court has long held that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222. This "rule of lenity" has been recently reaffirmed, *Simpson* v. *United States*, 435 U.S. 6, 14, and is related to the Court's duty to protect the rights of the individual." *Dalia* v. *United States*, 441 U.S. 238, 263 (Stevens, J., dissenting).

As has been set forth above, punishing petitioner as a recidivist undermines the central purpose of the Federal Youth Corrections Act and does not serve the legitimate purposes of recidivist statutes. Approving this result would be choosing the harshest alternative even though

Congress, to the extent it has spoken at all, suggests a different result.

> Critical review would not require the Court to reconsider the substantive wisdom of congressional choices, nor would it require the Court to disapprove every inequity resulting from a statute's enforcement. A critical judicial role does demand, however, that the Court approve only those harsh results inevitably attendant on specifically chosen policies. Arbitrary harm unnecessarily imposed on individuals cannot be legitimated.

Note, "Intent," *supra*, 95 Harv. L. Rev. at 906.

Petitioner submits that his conviction and punishment as a recidivist felon, based upon a special term of probation served between 1971 and 1973, is "arbitrary harm unnecessarily imposed." Two statutes, written at two different times, for entirely different purposes, were construed together in a damaging way, not clearly intended by Congress. This need not be the result. It should not be allowed to stand.

CONCLUSION

For the reasons set forth above, petitioner asks that his felony sentence be vacated and that his case be remanded

to the court below for resentencing pursuant to 22 U.S.C. § 3215.

Respectfully submitted,

LINDA GILLESPIE STUNTZ
House Annex 2, Room 564
2nd & D Streets, S.W.
Washington, D.C. 20515
(202) 226-3400
Counsel for Petitioner

Of Counsel
ERWIN N. GRISWOLD, ESQ.
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES
DISTRICT OF COLUMBIA
vs.
MELVIN E TUTTEN

47324-70 B
Case No.

B) CDW
(Offense)

(Address)

11-17-70
(Date of Offense)

Permit No., NOI #, CCR # (As Applicable)

N/A
(Officer)

Date of Action	ACTION
2-12-71	PLEA guilty, Judgement guilty to Count "B" J HALLeck SENTENCE "B" FYCA "A" 5010A 2yr PROB J HALLeck

11-5 1982

I hereby certify, under the seal of this Court, that the foregoing is a true copy, from the official court records, of the disposition in the Superior Court of the District of Columbia in the above-entitled matter.

Clerk, Superior Court
of the District of Columbia

By _____
Deputy Clerk

FORM CD-1071/Jan. 81
Previous edition (C-6) obsolete
81—P8171

AFFIDAVIT OF JAMES E. PORTER

District of Columbia) ss:

James E. Porter, being first duly sworn, says:

1. I am Deputy Director of the Adult Probation Branch of the Social Services Division of the District of Columbia Superior Court and have held this position since 1975. During the period 1972 to 1975, I was Assistant Deputy Director of the Branch. Prior to that time, I was Chief of Youth Parole for the District of Columbia Department of Corrections.

2. In the course of my duties with the Adult Probation Branch of the Social Services Division, I have learned the procedures which are to be followed by probation officers in supervising young adults sentenced to probation under section 5010(a) of the Federal Youth Corrections Act (FYCA). Prior to the compilation in 1975 of these and other Adult Probation Branch procedures in a Manual (current pertinent provisions contained in Exhibit A hereto), I am not aware of any written records regarding these FYCA probation procedures. I am knowledgeable as to the procedures that were to be followed by probation officers supervising youths sentenced to probation under section 5010(a) of the FYCA during the term of Melvin Tuten's FYCA probation between 1971 and 1973.

3. According to those procedures, no later than 30 days prior to the end of the term of probation given a youthful offender, the supervising probation officer was to prepare a memorandum to the sentencing judge describing the offender's progress and adjustment to the community. The purpose of this memorandum was twofold: first, to provide an opportunity for the sentencing judge to consider whether or not to exercise his discretion and grant the youthful offender early discharge from probation; and second, to furnish the sentencing judge with the information necessary for the informed exercise of his discretionary judgment.

4. At the request of Melvin Tuten's counsel, I have reviewed the file prepared by Mr. Tuten's probation officers

during the period of his probation between 1971 and 1973. Based upon my review of this file, I have determined that no report was made to the sentencing judge 30 days prior to the end of Mr. Tuten's term of probation. Instead, Mr. Tuten's term of probation lapsed without further judicial attention.

/s/ James E. Porter
JAMES E. PORTER

Subscribed and sworn to before me this 3rd day of November, 1982.

/s/ James Indelsmith
JAMES INDELSMITH
Notary Public

My Commission Expires April 30, 1984

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

76-DO

OFFICE MEMORANDUM

TO: Phillip Collins, Deputy Director, Special Services Branch
James Porter, Deputy Director, Adult Branch

FROM: Alan M. Schuman, Director, Social Services

SUBJECT: Termination of Federal Youth Corrections Act 5010A Cases

DATE: May 27, 1982

As a result of an inquiry made by Lt. Arbuthnot of the Metropolitan Police Department, I named a committee to review and, if necessary, rework the manner in which the Division terminates Federal Youth Corrections Act cases. A finding of the committee was that the procedure for terminating 5010A cases was not uniform between the Adult and Special Services Branches or within either/both Branches. This lack of uniformity included the form used to recommend for or against early termination and vacation of the conviction.

To insure uniformity in procedures and forms used, the committee drafted the attached forms and procedures. They are to be incorporated into your Branch manuals.

Both forms have been forwarded to Howard Schuyler who will coordinate with the Research, Evaluation and Special Projects Division the finalized printed format and form numbers for each.

In the interim, the effective date for using the forms is immediately. This will mean copying the forms until printed ones are available.

There was no change made in the form that is forwarded to the judge for his/her signature that vacates the conviction. Continued use of that form as it is presently constituted is intended.

Should you have any questions, please contact me.

Attachments

cc: Committee Members:
Kevin Fidgeon
Margaret Livingston
Al Yarborough
Nancy Cohen

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
SOCIAL SERVICES DIVISION
WASHINGTON, D. C. 20001

TO: : The Honorable _____

FROM : _____

Subject: Federal Youth Corrections Act - Section 5010A

RE : _____

Docket Number: _____ PDID Number: _____

On _____, the above named defendant received a suspended sentence under 5010A of the Federal Youth Corrections Act and was placed on probation for _____ months. The defendant had been convicted of _____ on _____

At sentencing, certain conditions of probation were stipulated. The following indicates each condition and whether it has been met to date.

Condition(s)	Met	Not Met
1. _____	☐	☐
2. _____	☐	☐
3. _____	☐	☐
4. _____	☐	☐

Regarding rearrests, the defendant has:

☐ remained arrest free.

☐ been rearrested; however, the charge was nolle prosequi; dismissed or no papered.

☐ been rearrested, however, the case is still pending.

☐ been rearrested and convicted of _____ on _____.

Furthermore, the defendant's adjustment to supervision has been

☐ satisfactory ☐ unsatisfactory

Based on the above information, I am recommending that:

☐ the defendant's probation be terminated and the conviction set aside in accordance with the provision of paragraph 5021 of the Federal Youth Corrections Act.

☐ the defendant's probation expire without the benefits described in paragraph 5021 of the Federal Youth Corrections Act.

☐ the defendant's probation be extended

☐ until information on the pending rearrest is received.

☐ due to poor probation adjustment.

_____ _____
Probation Officer Approved by Supervisory Probation Officer

☐ Attached you will find the necessary forms for vacating the defendant's sentence. To insure compliance with the terms of Section 5010A, these forms should be completed prior to the expiration date of the defendant's probation term.

Form [illegible]

SPECIAL PROCEDURES

Youth Corrections Act—Probation
Section 5010A

A. General

Under the Federal Youth Corrections Act (Title 18, Chapter 402, U.S. Code), Section 5010 A, if the Court feels a youth does not need commitment, it may suspend sentence and place him on probation. If a probationer successfully completes his probation period, the Court may set aside his conviction. This provision of the FYCA is intended to give ex-offenders the opportunity to clear their records so that they will not be hampered in economics and other opportunities later in life.

B. Policy

1. Only those offenders who display exemplary behavior during probation are entitled to have their conviction set aside.
2. Any probationer who has been arrested and convicted on a new charge would not be recommended to the Court to receive the benefits of the FYCA.
3. If the defendant is to have his conviction set aside, the Probation Officer must request that there be an early termination of probation.

PROCEDURES

The following guidelines should be utilized when closing any F.Y.C.A.:

1. The FYCA memorandum (Form # ____) must be forwarded to the sentencing judge at least thirty (30) days prior to the expiration of probation.
2. The original Certificate of Vacation and an Order of Discharge and two copies of each are filled out and submitted to the sentencing judge along with the FYCA memorandum for his/her signature.
3. Upon approval of early termination and return of the signed paper, an original of each form is given to the

client, a copy is placed in the Court jacket, the probation file and given to the attorney of record.

4. Notification of the early termination is sent to the FBI and Metropolitan Police Dept. using Form SS(4) 918 so that they can note in their records that the conviction is set aside. An original and two copies are prepared. The original is forwarded to Metropolitan Police Dept. and copies to the FBI and the probation file.